STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOEL MARCEL CARTER,

Defendant-Appellant.

UNPUBLISHED
September 21, 2004

No. 249089
Monroe Circuit Court
LC No. 02-031916-FH

Before: Cavanagh, P.J., and Smolenski and Owens, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of delivery of 50 grams or more but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii), conspiracy to deliver the same, and possession of marijuana, MCL 333.7403(2)(d). He was sentenced to consecutive sentences of 10 to 20 years' imprisonment for the conspiracy to deliver and delivery of cocaine convictions, and to 275 days for his possession of marijuana conviction to be served concurrently. Defendant appeals as of right. We affirm.

This case stems from a controlled buy of cocaine on February 1, 2002. Defendant contacted undercover police officer Paul Royal in late January 2002 regarding whether Trooper Royal was interested in buying any drugs. Trooper Royal had previously bought drugs from defendant. Through a series of phone calls over the next four days, defendant and Trooper Royal agreed to meet in a parking lot in Dundee. Defendant was to deliver four and one-half ounces of cocaine. Defendant arrived in a purple Escort driven by alleged coconspirator Demetrick Garner and got into the passenger side of Trooper Royal's car. Defendant produced a brick of cocaine and Trooper Royal gave defendant $1,900, far less than the agreed upon sale price. Defendant and Mr. Garner were subsequently arrested on the scene.

Defendant first argues that his due process rights were violated when the trial court allowed the prosecution to substantively amend the information after defendant's close of proofs. A trial court's decision to grant or deny a motion to amend an information is reviewed for an abuse of discretion. An abuse of discretion exists if the result is so contrary to fact and logic that it evidences a perversity of will, a defiance of judgment, or an exercise of passion or bias, or if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling. *People v McGee*, 258 Mich App 683, 686-687; 672 NW2d 191 (2003) (citations omitted).

Both MCL 767.76[1] and MCR 6.112(H)[2] permit the substantive amendment of an information at any point during criminal proceedings so long as the amendment does not prejudice the defendant. *McGee, supra* at 686. This includes an amendment directed at curing a variance between the information and the proofs, unless the amendment charges a new crime. *People v Higuera*, 244 Mich App 429, 444; 625 NW2d 444 (2001). In this case, after both parties had rested, the prosecution moved to amend the information to add an unknown conspirator based on defendant's testimony that Garner was not involved in the drug transaction and that defendant had obtained the cocaine from another individual.[3] Over defendant's objection, the motion was granted.

In determining whether an amendment to a criminal charge would cause unacceptable prejudice to a defendant, a court must consider whether the amendment would cause unfair surprise, inadequate notice, or insufficient opportunity to defend. *People v Hunt*, 442 Mich 359, 364; 501 NW2d 151 (1993). Here, defendant asserts that "the amendment charged an entirely different offense." Defendant contends that, being apprised of the charges against him, he presented a defense which showed that he did not conspire with Garner, the named coconspirator in the information, and that the amendment was prejudicial because it affected his ability to present an alternate defense.

We simply cannot say that defendant was prejudiced by this amendment in such a manner so as to violate his due process rights. First, the amendment did not substantively change the charge against defendant. Count II of the information, both before and after the amendment, alleged conspiracy to deliver 50 to 224 grams of cocaine. The only difference is that the amended count added an unnamed person as a co-conspirator. *People v Weathersby*, 204 Mich App 98, 104; 514 NW2d 493 (1997). The amendment did not change the elements of the offense or the penalty. Second, the information fairly put defendant on notice as to the transaction the conspiracy charge was based on. And no new evidence was needed to sustain the charge. Defendant's prejudice was caused by his own testimony admitting to participating in a conspiracy to deliver cocaine, establishing the elements of the conspiracy offense.[4]

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[1] MCL 767.76 provides in part, "The court may at any time before, during or after the trial amend the indictment in respect to any defect, imperfection or omission in form or substance or of any variance with the evidence." Although the statute refers to an "indictment," all laws applying to prosecutions by indictment also apply to prosecutions by information, unless otherwise specified. *McGee, supra* at 687.

[2] MCR 6.112(H) provides in part, "The court before, during, or after trial may permit the prosecutor to amend the information unless the proposed amendment would unfairly surprise or prejudice the defendant."

[3] After the amendment, count II of the information alleged that defendant "did unlawfully conspire, combine, confederate and agree together with Demetrick Earl Garner and/or another unnamed individual . . . ."

[4] A criminal conspiracy occurs when two or more individuals voluntarily agree to effectuate the commission of a criminal offense. *People v Justice (After Remand)*, 454 Mich 334, 345-346; 562 NW2d 652 (1997).

Defendant likens his case to the situation in *Gray v Raines*, 662 F2d 569, 571 (CA 9, 1981), where the defendant was charged with forcible rape, but after presenting a consent defense, the prosecutor requested a jury instruction on statutory rape, which was given, and the defendant was convicted of statutory rape. The Ninth Circuit held that this violated the defendant's due process rights because the forcible and statutory rape were separate, distinct offenses. *Id*. at 573. This case is clearly distinguishable from the one at bar because the amendment here did not change the offense. We hold that the trial court did not abuse its discretion in granting the prosecutor's motion to amend the information to conform to the proofs presented by defendant at trial.

Defendant next argues that the evidence was insufficient to support his conspiracy conviction.[5] In reviewing the sufficiency of the evidence, this Court must view de novo the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999); *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). Circumstantial evidence and the reasonable inferences which arise from the evidence can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). It is for the trier of fact to determine what inferences can be fairly drawn from the evidence and to determine the weight to be accorded to the inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

Defendant claims that his conviction for conspiracy to deliver cocaine cannot stand because the prosecution introduced no evidence to show that defendant's alleged co-conspirator(s) possessed the requisite specific intent to deliver the statutory minimum amount of cocaine as charged, i.e., the co-conspirator knew of and agreed to further the criminal objective of delivery of at least fifty grams but less than 225 grams of cocaine. *People v Justice (After Remand)*, 454 Mich 334, 349; 562 NW2d 652 (1997). We disagree.

Defendant was charged with delivery of 50 grams or more but less than 225 grams of cocaine and conspiracy to do the same. Conspiracy is a separate and distinct crime from that which is the object of the conspiracy. *People v Mass*, 464 Mich 615, 632; 628 NW2d 540 (2001). While delivery of cocaine is a general intent crime, conspiracy is a specific intent crime. *Id*. at 628-629. Conspiracy is defined as the specific intent to combine with others to accomplish an illegal objective. *Id*. at 629; see also MCL 750.157a. In the context of conspiracy to deliver, the prosecution must prove beyond a reasonable doubt "which delivery offense a defendant conspired to violate." *Mass*, *supra* at 634. Thus, in addition to the elements of delivery of cocaine, the prosecution must prove that a defendant and another person had the specific intent to combine to deliver the statutory minimum as charged to a third person.[6] *Id*. at 630.

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[5] We note that defendant is not appealing his conviction for delivery of the cocaine. Therefore, we disregard plaintiff's argument as to that conviction.

[6] Plaintiff argues that *Mass* was wrongly decided in that it held that knowledge of the amount agreed to be delivered was an element of conspiracy to deliver. We believe that *Mass* was correctly decided, but regardless, we are bound to follow *Mass* until our Supreme Court overrules its decision. *People v Hall*, 249 Mich App 262, 270; 643 NW2d 253 (2002).

> The term "combine" means that all the participants formed an agreement, express or implied, to accomplish the objective of the conspiracy. That is, all parties shared knowledge that the narcotics are ultimately to be delivered to a third party for consumption and all agreed to meet this objective of delivery by fulfilling their agreements. [*Justice, supra* at 345 n 19 (citations omitted).]

Direct proof of the conspiracy is not required; rather, proof may be inferred from the circumstances, acts and conduct of the parties. *Id.* at 348.

The gist of the crime of conspiracy is the agreement to commit an unlawful act. *Id.* at 345. Here, defendant admitted in court that he obtained a large quantity of drugs from an unnamed individual for the purpose of delivering it to the undercover police officer. The officer testified that he asked defendant to obtain four and one-half ounces, or one-eighth of a kilogram (125 grams), of cocaine for which the officer would pay defendant $4,200 or $4,500.[7] And the evidence established that the amount of cocaine the officer received was 111 grams.

We agree with defendant that the evidence is insufficient to prove that defendant conspired with Mr. Garner to deliver the cocaine. Even viewing the evidence in the light most favorable to the prosecution, the most the evidence established was that Garner gave defendant a ride, was paid $75 to do so, and was in possession of a cell phone at the time of his arrest. Defendant denied that Garner was aware of the drug transaction, Garner did not testify, nor were any of his statements permitted to be introduced, and no cell phone records were presented to show that defendant used the phone in Garner's possession to call the undercover police officer.

However, we do find that there was sufficient evidence presented from which the jury could reasonably infer that defendant conspired with an unnamed person to deliver 50 grams or more but less than 225 grams of cocaine. Defendant testified that he told this person how much cocaine he wanted, assumed the amount he was given represented that amount, and gave the undercover officer all the cocaine that he received from this unnamed person.[8] The undercover officer testified that he agreed to buy 125 grams of cocaine from defendant, the amount he received weighed 111 grams which is "quite a bit of cocaine," and it was packaged as a brick, appearing to have been broken off a larger brick of cocaine. Even though defendant did not testify that he specifically told his supplier that he would be delivering the cocaine to third party, the jury could reasonably infer, given the amount of cocaine, that the supplier knew defendant would be reselling it.

Also, defendant testified that he balked when the officer gave him only $1,900 because he had to "bring this guy his money back," implying that he had bought the cocaine on credit. It

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[7] The undercover officer stated that the agreed upon price was dependent on how far from Detroit defendant had to travel in order to consummate the sale.

[8] Defendant stated, "[A]ll I know is that I had told the person what I wanted, he gave it to me, and I'm bringing it to him, all right? I didn't know what it was or nothing like that, how much it weighed. I told him it – should all be there 'cause that's what I told the guy, exactly how much he wanted."

was reasonable for the jury to infer that the supplier knew that defendant would be reselling the brick and paying for it with the money he made from the transaction. Furthermore, defendant stated that had he sold the cocaine for $4,000 he would still have made a little profit and the undercover officer testified that $4,000 was a more reasonable price, $4,200-$4,500 being a premium price. The officer could not estimate the retail value of the cocaine because it would depend on how it was subsequently cut and packaged, but the maximum retail value was probably $15,000. The jury could reasonably infer that the unnamed supplier knew the cocaine was not for personal use given these dollar amounts. While general conspiracy law prevents a defendant from being convicted of a conspiracy based solely on a coconspirator's confession that was obtained before or after the conspiracy,[9] there is no basis for precluding a conviction based on the defendant's *own* statements.

Defendant also asserts on appeal an ineffective assistance of counsel claim. Generally, to establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002); *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000), and (3) that the resultant proceedings were fundamentally unfair or unreliable, *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). Counsel's performance must be measured against an objective standard of reasonableness and without benefit of hindsight. *Bell, supra* at 698.

Defendant argues that his original trial counsel told him that he would not be found guilty of delivery of cocaine if he testified that he only "intended" to deliver the cocaine. Defendant claims that as a result of this inaccurate statement, he withdrew his guilty plea and went to trial. Defendant asserts that his prejudice stems from the fact that had he not withdrawn his plea, his sentence would have been substantially less. We fail to find any merit to defendant's argument.

On April 19, 2002, after a *Cobbs*[10] evaluation during which the trial court informed defendant that it would not sentence defendant to a term less than he would receive were he to accept the pending plea agreement, and after conferring with defense counsel, defendant decided to accept the plea agreement. In exchange for defendant's guilty plea to delivery of 50 grams or more but less than 225 grams of cocaine, the conspiracy and possession of marijuana charges were to be dismissed. In addition, defendant would not be charged with delivery of cocaine to the same undercover officer in November 2001. The sentence to be imposed, eight to twenty years' imprisonment, was a downward departure of two years less than the statutory minimum. After ensuring that defendant's guilty plea was knowingly and voluntarily given, the court accepted defendant's plea per the terms of the plea agreement.

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[9] *People v Berryman*, 43 Mich App 366, 373; 204 NW2d 238 (1972).

[10] *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993).

On July 12, 2002, the court heard defendant's motion to withdraw his plea. He claimed that because of the medications[11] he was on at the time he entered his plea, he did not fully understand the proceeding and its ramifications. Additionally, defendant maintained he was pressured into pleading guilty to crimes he did not commit because of the downward sentencing departure offered in the plea agreement. Although the court believed that defendant knowingly and voluntarily entered a guilty plea, it nevertheless allowed defendant to withdraw his plea. At the same time, the court permitted defense counsel to withdraw his representation citing a communication breakdown and defendant's mother's financial inability to continue to retain defense counsel. Defendant was appointed counsel, proceeded to trial, and was convicted as charged. At sentencing, defendant claimed that the reason he went to trial was because he

> was told that there was a possibility of me getting intent to deliver at trial. I wasn't trying to waste the Court's time with this matter, I just thought that I was guilty of intent to deliver, I didn't think I would be found guilty of delivery that's why I was so honest and outspoken and candid 'cause I thought I was guilty of intent to deliver.

Because defendant failed to move for an evidentiary hearing or a new trial, this Court's review is limited to the facts contained on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). First, we note that on appeal defendant does not specify which defense counsel allegedly misadvised him. But because defendant claims that as a result he withdrew his guilty plea, we can only assume defendant is referring to Robert Zaranek, defense counsel at the time defendant was permitted to withdraw his guilty plea. Second, the record does not support defendant's assertion that he was given inaccurate advice. When he withdrew his plea, defendant stated it was because he did not fully understand the proceeding due to medication he was taking and that he was innocent of the charges against him. At sentencing, after his convictions, defendant did state, "The reason I did go to trial is because I was told that there was a possibility of me getting intent to deliver at trial;" however, defendant failed to identify who gave him this information. Furthermore, Zanarek stated that one of the reasons he was requesting to withdraw as counsel was because, "[Defendant's] got his own ideas; doesn't really want to listen to what I have to say to him."

Based on the record before us, we can see no reason to attribute defendant's withdrawal of his guilty plea to anything but his own wishes. Moreover, the record indicates that defendant was offered a similar plea agreement before the trial began and rejected it over his then defense counsel's advice. Defendant stated in court that he wanted to go forward with the trial because he was not comfortable with the plea agreement.[12] Accordingly, we find no merit to defendant's ineffective assistance of counsel claim.

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[11] Defendant suffers from multiple sclerosis.

[12] The details of the second plea agreement were not placed on the record, although defense counsel did mention that he would plead to the same charge as before. Presumably, then, the sentencing portion differed.

Next, defendant raises two sentencing issues. First, he argues that the trial court erred in denying his motion for resentencing because the amended controlled substance statute applied to his case. The question this issue raises is whether the legislative sentencing guidelines applicable to MCL 333.7401 as amended,[13] 2002 PA 665, apply to offenses committed before the amendment's effective date of March 1, 2003. This question was recently answered by our Supreme Court in *People v Dailey*, 469 Mich 1012; 678 NW2d 439 (2004).

In *Dailey*, the defendant had pleaded guilty to possession with intent to deliver 50 grams or more but less than 225 grams of cocaine, which, at the time the defendant committed the offense, carried a mandatory sentence of ten to twenty years' imprisonment. This Court held that the defendant was entitled to resentencing because the trial court failed to explain why certain factors it identified constituted substantial and compelling reasons to depart downward from the mandated minimum term. *People v Dailey*, unpublished opinion per curiam of the Court of Appeals, issued August 26, 2003 (Docket No. 239683). In a footnote, this Court stated:

> 2002 PA 665, effective December 26, 2002, made extensive revisions to MCL 333.7401. MCL 333.7401(2)(a)(iii) now provides that possession with intent to deliver 50 grams or more but less than 450 grams of a controlled substance is punishable by imprisonment for not more than twenty years or a fine of not more than $250,000.00, or both. As a general rule, the proper sentence is that which was in effect at the time the offense was committed. See *People v Schultz*, 435 Mich 517, 530; 460 NW2d 505 (1990). The amended version of MCL 333.7401(2)(a)(iii) enacted while this case was pending on appeal is ameliorative in that it eliminates the requirement that the sentencing court impose a minimum term of not less than ten years. On remand, defendant is entitled to seek resentencing under the amended version of MCL 333.7401(2)(a)(iii). See *People v Shinholster*, 196 Mich App 531, 533-534; 493 NW2d 502 (1992); *People v Sandlin*, 179 Mich App 540, 543-544; 446 NW2d 301 (1989). [*Id.*, slip op 1 n 1.]

In lieu of granting leave to appeal, our Supreme Court vacated this footnote "because it is inconsistent with MCL 769.34(2)."

> [MCL 769.34(2)] provides that courts shall sentence defendants in accord with the minimum sentences prescribed by the 'version of those sentencing guidelines in effect on the date the crime was committed.' This demonstrates a legislative intent to have defendant sentenced under the law in effect on the date of his offense, which predated the amendment to MCL 333.7401. [*Dailey, supra* at 469 Mich 1012.]

Accordingly, because the legislative sentencing guidelines did not apply to the instant offenses on the date defendant committed them, he is not entitled to resentencing on this basis.

[13] MCL 777.13m states that the legislative sentencing guidelines apply to drug-related offenses, including MCL 333.7401. 2002 PA 666 (effective March 1, 2003).

Second, defendant asserts that he is entitled to resentencing because he was sentenced according to inaccurate information, namely that defendant was involved in selling kilos of cocaine. However, a party may not raise on appeal an issue challenging the scoring of the guidelines or challenging the accuracy of information relied upon in determining a sentence which is within the appropriate guidelines range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 309-310; 684 NW2d 669 (2004). In this case, defendant was sentenced to the applicable mandatory prison terms and he did not raise this issue at sentencing, in his motion for resentencing, or in a motion for remand.

Moreover, we find that the "inaccurate information" defendant cites is a distortion of the court's comments. The court never stated that it believed defendant was involved in selling kilos of cocaine. Rather, it stated that the delivered cocaine appeared to have been broken off of a kilo given its brick-like, as opposed to granular, form. Thus, the court noted that defendant dealt "with people that have access to an extreme amount of cocaine." The court acknowledged its ability to depart downward in sentencing defendant, but stated that it could not find any substantial and compelling reason to do so. Accordingly, we find that defendant is not entitled to resentencing.

Lastly, defendant contends that the trial court erred in requiring him to pay restitution for conduct that did not give rise to the instant convictions and that his trial counsel was ineffective for failing to object to the ordered restitution amount. At sentencing, the court ordered defendant to pay $1,450 in restitution to the Michigan State Police for unrecovered buy money and the subsequent forensic testing stemming from a drug transaction defendant completed with Trooper Royal on November 26, 2001, a few months prior to the transaction that gave rise to defendant's convictions in this case. Trooper Royal paid defendant $1,300 for twenty-five ounces of cocaine. Defendant argues that the restitution ordered in this case was impermissible because it relates to conduct for which defendant was never charged. We disagree.

This Court has held that the loss of "buy money" is compensable under the Crime Victim's Rights Act, MCL 780.751 *et seq.*, as a "financial harm that results from the commission of a crime." *People v Crigler*, 244 Mich App 420, 426-427; 625 NW2d 424 (2001). Therefore, narcotics enforcement teams are permitted "to obtain restitution of buy money lost to a defendant as a result of the defendant's criminal act of selling controlled substances." *Id.* at 427. And MCL 780.766(2) provides in pertinent part that a defendant must pay restitution "to any victim of the defendant's course of conduct that gives rise to the conviction . . . ."[14]

In *People v Gahan*, 456 Mich 264, 272; 571 NW2d 503 (1997), our Supreme Court concluded that there was no indication that the Legislature intended to restrict the broad common-law construction given to the phrase "course of conduct." Thus, the Court held that restitution may be ordered for all losses incurred by victims attributable to a defendant's illegal scheme that culminated in his conviction even if some of those losses were not the factual basis

[14] See also MCL 769.1a.

of the charge that resulted in the conviction. *Id*. Therefore, giving broad meaning to this phrase, it appears to encompass defendant's earlier drug transactions with Trooper Royal.

Defendant attempts to distinguish this case from *Gahan*, which involved the defendant's repeated scheme to defraud his customers in the same or similar manner. The defendant would tell his customers that their cars sold for less than the actual price and pocketed the difference. In dicta, the *Gahan* Court stated, "Although totally dissimilar crimes committed at different times may not satisfy the statutory 'course of conduct' requirement, such facts are not presented in this case." *Id*. at 273 n 11. Defendant contends that the November 2001 drug buy was a totally dissimilar crime that occurred at a different time and, therefore, cannot be considered part of defendant's "course of conduct" as contemplated by the restitution statute. We find no merit to this argument. Defendant's course of conduct in this instance is his repeated sales of cocaine to Trooper Royal.[15] We can discern no meaningful difference between the defendant's continuing illegal fraud scheme in *Gahan* and defendant's continuing drug sales in this case to the same police officer. Had defendant not been involved in previous drug sales with OMNI, the narcotics enforcement team, he would not have contacted Trooper Royal regarding the drug sale which gave rise to his instant convictions. Therefore, we conclude that the trial court did not err in ordering defendant to pay restitution in the amount of $1,450 for the recoupment of "buy money" and subsequent lab testing of the cocaine. Accordingly, because defense counsel is not required to make a futile objection, *People v Riley*, 468 Mich 135, 142; 659 NW2d 611 (2003), we likewise reject defendant's ineffective assistance of counsel claim.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Michael R. Smolenski
/s/ Donald S. Owens

[15] See also *People v Bixman*, 173 Mich App 243, 246; 433 NW2d 417 (1988) (This Court held that restitution for nonsufficient funds checks for which defendant was not convicted was proper because those checks were part of the defendant's course of conduct which gave rise to his one conviction for a nonsufficient funds check over $200).